

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY EDYLE BURKE,

Defendant.

NO. CR-11-044-EFS
NO. CR-06-0113-EFS**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS INDICTMENT
WITH PREJUDICE and RESETTling
SUPERVISED-RELEASE-VIOLATION
HEARING**

A hearing occurred in the above-captioned matter on May 5, 2011, in these criminal matters. Defendant Anthony E. Burke was represented by Pete Schweda. Assistant U.S. Attorney Thomas Rice appeared on behalf of the U.S. Attorneys Office (USAO). Before the Court in CR-11-2044-EFS was Defendant's Motion to Dismiss Indictment with Prejudice (ECF No. [13](#)), which seeks dismissal because he was not in custody on April 27, 2010, and therefore could not "escape" under 18 U.S.C. § 751(a). The USAO opposes the motion, contending Defendant was in custody because his liberties were sufficiently restricted during the Court-ordered residential reentry center (RRC) stay. After reviewing the submitted material and relevant authority and hearing from counsel, the Court granted Defendant's motion for the reasons set forth below. The supervised-release violation hearing in CR-06-113-EFS then commenced. The Court accepted Defendant's admissions to the three charged supervised-release violations and set a hearing to address punishment.

1 **A. Background**

2 On September 29, 2009, Defendant was sentenced to seven months and
3 twenty-one days for supervised-release violations in CR-06-113-EFS. He
4 was also ordered to serve twenty-eight months of supervised release – 180
5 days of which was to be served at an RRC:

6 Defendant shall reside in a residential reentry center for a
7 period up to 180 days. This placement may include a pre-
8 release component, day reporting and home confinement (with or
9 without electronic monitoring but not include GPS) at the
direction of the CCM and USPO. Defendant shall abide by the
rules and requirements of the facility, Defendant shall remain
at the facility until said 180 days has been completed.

10 (CR-06-113-EFS: ECF No. 136 at 5, No. 17.)

11 Defendant completed his imprisonment sentence and began supervised
12 release on March 19, 2010. In compliance with the supervised-release RRC
13 requirement, Defendant resided at the Spokane Residential Reentry Center
14 (SRRC). The SRRC's rules and conditions 1) required keeping his room
15 orderly, 2) prohibited any food or beverage in the sleeping area, 3)
16 subjected living areas and persons to random search, 4) assigned cleaning
17 tasks, 5) restricted certain personal property, 6) prohibited smoking on
18 the property, 7) restricted visitation, and 8) required regular urine and
19 breathalyzer testing. (ECF No. 18-1.) The SRRC's Handbook warned,
20 "[a]ny resident who is arrested for violation of a law must be charged
21 with Escape/Abscond." *Id.* at 19.

22 On April 27, 2010, Mr. Burke failed to return to SRRC. As a result,
23 SRRC terminated his placement and reported him to the Eastern District
24 of Washington's Probation Office and the Bureau of Prisons (BOP) as an
25 absconder, not an escapee. The next day in Montana Defendant was
26 arrested for felony criminal endangerment and later convicted and
sentenced for that crime by a Montana court. Defendant was then returned

1 to this district to appear for his supervised-release violations. On
2 March 22, 2011, a new Indictment charged Defendant with escape:

3 On or about April 27, 2010, at Spokane, in the Eastern District
4 of Washington, ANTHONY EDYLE BURKE, did knowingly escape from
5 the custody of a residential re-entry center, a facility in
6 which he was lawfully confined at the direction and by virtue
7 of a judgment in a criminal case filed September 29, 2009, in
8 the United States District Court for the Eastern District of
Washington upon conviction for the felony of possession of
ammunition by a person who has previously been committed to a
mental institution, in violation of 18 U.S.C. § 922(g)(4), by
willfully failing to return to the facility as required, all
in violation of 18 U.S.C. § 751(a).

9 (CR-11-2044-EFS: ECF No. 1.)

10 **B. Authority and Analysis**

11 Section 751(a) provides:

12 (A) Whoever [1] *escapes* or attempts to escape [2] from the
13 custody of the Attorney General or his authorized
14 representative, or from any institution or facility in which
15 he is confined by direction of the Attorney General, or from
16 any *custody under or by virtue of any process issued under the*
17 *laws of the United States by any court, judge or magistrate*
judge, or from the custody of an officer or employee of the
United States pursuant to lawful arrest, shall, [3] *if the*
custody or confinement is by virtue of an arrest on a charge
of felony, or conviction of any offense, be fined under this
title or imprisoned not more than five years, or both; . . .

18 18 U.S.C. § 751(a) (emphasis added). Here, only the second element –
19 custody – is disputed.

20 In *United States v. Baxley*, the Ninth Circuit commented upon the
21 term “custody” as used in § 751(a). 982 F.2d 1265, 1270 (9th Cir. 1992).
22 The defendant in *Baxley* was released pending trial with a special
23 condition that he reside in a halfway house.¹ The defendant did not

24
25 ¹ For purposes of this Order, the Court need not differentiate
26 between an RRC and a halfway house because Defendant’s stay at the RRC
was not part of imprisonment but rather a supervised-release condition.

1 return to the halfway house and was charged with escape under § 751(a).
2 The Ninth Circuit noted "custody" is a term that varies when used in
3 different contexts and found the defendant's pretrial-release conditions
4 more analogous to probation rather than to custody given that the
5 defendant was allowed to go to work and leave the facility as long as he
6 logged the time, purpose, and duration of his trips. *Id.* at 1269. The
7 Ninth Circuit added, "[i]f an individual violates probation, he is not
8 tried for escape; rather, this probation is revoked, and he can be
9 indicted for escape only if he thereafter fails to report for custodial
10 incarceration." *Id.* at 1269-70. See also *United States v. Person*, 223
11 F. Supp. 982 (S.D. Cal. 1963) (finding that individual who was paroled
12 and failed to return to halfway house was not in custody for purposes of
13 § 751(a)). Accordingly, the Ninth Circuit held the defendant was not
14 custody under § 751(a). *Id.* at 1270.

15 The USAO submits *Baxley* is distinguishable and encourages the Court
16 to follow *United States v. Kates*, --- F. Supp. 2d ---, 2011 WL 1256848
17 (W.D.N.Y. Apr. 1, 2011), and *United States v. Sack*, 379 F.3d 1177 (10th
18 Cir. 2004). Like Defendant Burke, the defendant in *Kates* was required
19 to stay in a halfway house as a condition of his supervised release. The
20 district court interpreted custody broadly and found the defendant's
21 failure to return to the court-ordered halfway house constituted escape
22 from custody under § 751. Similarly, the Tenth Circuit in *Sack* found the
23 defendant, who was ordered to reside in a halfway house as a requirement
24 of pretrial release, was in custody for purposes of § 751. The Tenth
25 Circuit emphasized custody is to be interpreted broadly and noted the
26 restrictions at the halfway house were sufficiently limiting so as to
constitute custody for purposes of § 751. *Id.* at 1179 n.1. The Tenth

1 Circuit even noted that a defendant who escapes from a court-designated
2 third-party custodian, such as a designated family member, would be in
3 custody for purposes of § 751. The Tenth Circuit disagreed with *Baxley's*
4 determination that a halfway house is not sufficiently restrictive to
5 constitute custody. *Id.* at 1181

6 The Court concludes *Sack* and *Kates* interpret custody too broadly for
7 purposes of § 751(a). An individual who is on release, either pretrial
8 or post-imprisonment, enjoys much more liberty than an individual who is
9 in traditional custody, even if that individual must reside in a halfway
10 house. Applying custody too broadly would violate the rule of lenity.
11 See *Liparota v. United States*, 471 U.S. 419, 427 (1985) ("[A]mbiguity
12 concerning the ambit of criminal statutes should be resolved in favor of
13 lenity."); *Baxley*, 982 F.3d at 1270.

14 Many of the rules and requirements at the SRRC mirror Defendant's
15 standard supervised-release conditions: 1) travel restriction within the
16 judicial district, 2) report and be truthful to the probation office, 3)
17 work regularly at a lawful occupation, and 4) not associate with felons
18 unless given permission by the probation office. In addition,
19 Defendant's special supervised-release conditions require him to: 1)
20 submit his person and residence to reasonable searches, 2) not access
21 information regarding bomb making, terrorism, or false identification,
22 3) not possess knives, weapons, GPS systems, police scanners, or similar
23 items, and 4) abstain from alcohol and non-prescribed controlled
24 substances and submit to testing to ensure abstention. The differences
25 between Defendant's supervised-release conditions and the remaining SRRC
26 restrictions, e.g., 1) refrain from smoking, 2) advise SRRC of his

1 comings and goings, 3) abide by curfew, and 4) limit visitors, are not
2 sufficient to constitute custody.

3 The Court recognizes custody is defined broadly and need not involve
4 physical restraint. See *United States v. Keller*, 912 F.2d 1058 (9th Cir.
5 1990). Other than *Kates* and *Sack*, the cases in which the courts found
6 custody addressed whether an individual was constructively in custody.
7 See *id.* at 1060 (finding that imposed sentence was effective and
8 therefore the defendant, who failed to report to jail as required by the
9 court during sentencing, was in custody); *United States v. Gowdy*, 628
10 F.3d 1265, 1268 (11th Cir. 2010) (finding individual who was mistakenly
11 released after state sentence even though a federal detainer was in place
12 and who was advised that he needed to turn himself in to federal custody
13 was in custody when he failed to report as agreed); *United States v.*
14 *Evans*, 159 F.3d 908, 912-13 (4th Cir. 1998) (finding prisoner who escaped
15 during execution of a state writ of habeas corpus ad prosequendum was
16 still in federal custody). Further, unlike the defendant in *United*
17 *States v. Jones*, Defendant was at SRRC as a condition of his supervised
18 release following completion of his imprisonment sentence – not at the
19 direction of BOP as a portion of his imprisonment sentence. 569 F.2d 499
20 (9th Cir. 1978) (finding individual who resided at a halfway house as
21 part of his imprisonment sentence was in custody for purposes of §
22 751(a)). Accordingly, this Court's ruling that Defendant was not in
23 custody while residing at SRRC as a condition of his supervised release
24 is consistent with Ninth Circuit, Fourth Circuit, and Eleventh Circuit
25 case law. The Court's finding is also consistent with the following
26 principles: 1) a violation of supervised release is not a misdemeanor
or conviction, see *United States v. Green*, 797 F.2d 855, 858 (10th Cir.

1 1986), 2) the restrictions at a halfway house are significantly less than
2 those at a custodial facility, see *Baxley*, 982 F.2d at 1269, and 3) the
3 purpose behind § 751(a) is to reduce the likelihood of escape from
4 official custody, which often involves violent and menacing behavior,
5 creating a risk to the guards and custodians, see *United States v. Brown*,
6 333 U.S. 18, 21 n.5 (1948).

7 **C. Conclusion**

8 For the above-given reasons, **IT IS HEREBY ORDERED:**

9 1. Defendant's Motion to Dismiss Indictment with Prejudice (**ECF**
10 **No. 13**) is **GRANTED**.

11 2. The Indictment (**ECF No. 1**) is **DISMISSED with prejudice**.

12 3. Defendant shall remain in custody pending resolution of his
13 admitted supervised-release violations in **CR-06-113-EFS** on **Thursday, July**
14 **7, 2011, at 8:30 a.m. in SPOKANE**.

15 **IT IS SO ORDERED.** The District Court Executive is directed to enter
16 this Order and to provide copies to all counsel, the U.S. Probation
17 Office, and the U.S. Marshal's Office.

18 **DATED** this 6th day of May 2011.

19
20 S/ Edward F. Shea

EDWARD F. SHEA

United States District Judge

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